SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 786

BURNS MORTGAGE COMPANY, INC., PETITIONER,

vs.

ERWIN M. FRIED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1931

16688

BURNS MORTGAGE COMPANY, INC.,

vs.

ERWIN M. FRIED

Blanc and Steinberg, Esqs. William H. Schneller.

DOCKET ENTRIES

Feb. 1, 1932. Præcipe to issue summons filed.
Feb. 1, 1932. Summons exit—returnable 1st Monday in March, 1932.
Feb. 1, 1932. Statement of claim and notice to file affidavit of defense filed.
Feb. 4, 1932. Summons returned—"on February 2, served," and filed.
Feb. 17, 1932. Appearance of W. H. Schneller, Esq., for defendant, filed.
Feb. 17, 1932. Affidavit of defense raising questions of law filed.
Apr. 25, 1932. Argued sur affidavit of defense raising questions of law.
May 16, 1932. Opinion, Dickinson, J., ruling in favor of defendant filed.
Oct. 5, 1932. Argued sur motion for re-argument.

[fol. 2]

Oct. 10, 1932. Opinion, Dickinson, J., denying motion for re-argument, filed.
Oct. 28, 1932. Judgment of non pros. with costs to defendant filed.
Nov. 15, 1932. Order of Court allowing exception filed.
Nov. 15, 1932. Assignments of Error filed.
Nov. 15, 1932. Petition for appeal filed.
Nov. 15, 1932. Order of Court granting appeal filed.

Nov. 15, 1932. Præcipe for transcript of record sur appeal filed.
Jan. 4, 1933. Bond sur appeal, with National Surety Company, surety, in $200, and decree approving same filed.
Jan. 4, 1933. Copy of Notice of Appeal filed.
Jan. 4, 1933. Citation allowed and issued.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

PLAINTIFF'S STATEMENT OF CLAIM IN ASSUMPSIT—Filed Feb. 1, 1932

The plaintiff Burns Mortgage Company, Inc., a corporation, claims of Erwin M. Fried, the defendant above named, [fol. 3] the sum of $6000.00 with interest at the rate of seven per cent (7%) per annum from August 28, 1925, which sum is justly due and payable by the defendant to the plaintiff upon a cause of action whereof the following is a statement:

1. The plaintiff, Burns Mortgage Company, Inc., is a corporation organized and existing under the laws of the State of Florida.

2. The defendant, Erwin M. Fried, is a resident of Allentown, Lehigh County, and is a citizen of the State of Pennsylvania.

3. The amount claimed by the plaintiff in this action exceeds the sum of $3000.00 exclusive of interest and costs.

4. On or about August 28, 1925 at Miami, Florida, the defendant Erwin M. Fried, for valuable consideration made, executed and delivered to Golden Isles Corporation his six promissory notes for $1000.00 each, one promissory note payable on or before February 28, 1926, one promissory note payable on or before August 28, 1926, one promissory note payable on or before February 28, 1927, one promissory note payable on or before August 28, 1927, one promissory note payable on or before February 28,

1928 and one promissory note payable on or before August 28, 1928, respectively. True and correct copies of the said notes are attached hereto, made part hereof and marked Exhibits "A," "B," "C," "D," "E" and "F."

5. Prior to the maturity of each of the aforesaid notes, the payee thereof, Golden Isles Corporation, acting by S. A. Kagey, its President and duly authorized agent, for value duly endorsed, transferred and delivered the said [fol. 4] notes to Walter Williamson who thereupon became the holder thereof in due course, without notice of any infirmity in the said notes or any defect in the title thereto.

6. Upon the respective maturity dates of the said promissory notes, to wit, March 1, 1926 (February 28, 1926 being Sunday), August 28, 1926, February 28, 1927, August 29, 1927 (August 28, 1927 being Sunday), February 28, 1928 and August 28, 1928, respectively, the aforesaid notes were duly presented for payment at 235 East Flagler Street, Miami, Florida, the place designated thereon for payment, but payment of the said notes was refused.

7. After maturity of each of the said notes, Walter Williamson, for value, duly transferred and delivered each of the aforesaid notes to the plaintiff, Burns Mortgage Company, Inc., a corporation, which thereupon became the holder thereof in due course, without notice of any infirmity in the said notes or any defect in the title thereto.

8. That by Sec. 6936 of the Compiled General Laws of Florida, entitled "Rate of Interest" it is provided that in all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 8 per cent per annum, but parties may contract for a less or greater rate by contract in writing; that by Sec. 6937 thereof, entitled "Usurious Contracts Defined," all contracts for the payment of interest upon loan, advance of money, or forebearance to enforce the collection of any debt or upon any contract whatever at a higher rate of interest than 10 per cent per annum are declared usurious; that the aforesaid laws [fol. 5] at all the times herein mentioned were and now are in full force and effect.

9. Although payment has frequently been demanded from the defendant, the defendant has failed and refused and still refuses to pay the principal or interest of the said notes, or any part thereof.

10. Wherefore, the plaintiff claims of the defendant the sum of $6000.00 with interest as aforesaid, which sum is justly due and payable.

Blanc and Steinberg, Attorneys for Plaintiff, by Sigmund H. Steinberg.

Duly sworn to by P. V. Burns. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or after February 28, 1926 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida; with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 1.

(Sgd.) Erwin M. Fried. (Seal). —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by J. H. Heeny, Treas. Without Recourse. Golden Isles Corporation, by S. A. Kagey.

[fol. 7] EXHIBIT "B" STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, Aug. 28, 1925.

On or before August 28, 1926 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Com-

pany, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 2.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 8] EXHIBIT "C" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before February 28, 1927 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 3.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 9] EXHIBIT "D" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before August 28, 1927 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 4.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 10] EXHIBIT "E" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before February 28, 1928 after date for value received I promise to pay to the Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred inter-

est payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 5.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 11] EXHIBIT "F" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before August 28, 1928 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices at the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 6.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW—Filed Feb. 17, 1932

Erwin M. Fried, defendant above named, although alleging that he has a full, just and legal defense to all of said

plaintiff's claim, and further alleging that he is not indebted to the Burns Mortgage Company, Inc., plaintiff above named, in the sum of Six Thousand Dollars ($6,000.00), with interest at the rate of seven (7) per cent per annum from August 28, 1925, or any sum whatsoever, upon a cause of action as set forth in said plaintiff's statement of claim, or any sum whatsoever upon any cause of action whatsoever, without answering the averments of facts set forth in said Statement of Claim, the defendant having been advised, believes and, therefore, avers that the said Statement of Claim filed in the above entitled case is insufficient at law, and is generally vague, indefinite, uncertain, informal and insufficient to support the action upon the alleged averments contained therein for the following reasons:

1. The statement of claim, filed by the above named plaintiff, and the matters therein contained, do not set forth a good cause of action.

2. The notes referred to in Paragraph 4 of the plaintiff's statement of claim are not negotiable instruments.

3. An examination of the plaintiff's statement of claim, as well as the notes therein referred to, will reveal that there has not been a proper assignment of said notes.

4. That the suit is improperly brought, in that, if there should be any merit to the plaintiff's claim, which is denied [fol. 13] by the defendant, the suit should be in the name of the payee, to the plaintiff's use.

5. Our negotiable instruments' law of May 16, 1901, P. L. 194 (which, so far as appears, is exactly the same as that of Florida, where the notes were made payable), provides in section 1, that:

"An instrument to be negotiable * * * must contain an unconditional promise or order to pay a sum certain in money";

and, in section 2:

"The sum payable is a sum certain, within the meaning of this Act, although it is to be paid: (1) With interest * * *"

Taken together these provisions mean that if a note provides for the payment of the principal sum and interest, it must clearly appear from the note itself, that at any given date the two will always aggregate "a sum certain"; otherwise, though the note might be for *a* "sum certain" so far as concerns the principal, it might be uncertain as to interest, or vice versa, notwithstanding that the statute declares it must always "contain an unconditional promise to pay a sum certain".

6. An examination of the notes set forth in the plaintiff's statement of claim will reveal that in the first sentence, the notes say the principal is payable "with interest thereon at the rate of seven per cent per annum from date until fully paid", which must mean whether before or after maturity. The last sentence says: "Deferred interest payments to bear interest from maturity at 10 percent per annum, semi-annually." "Deferred payments * * * from maturity" can only refer to all sums which the notes [fol. 14] say are to mature in the future, that is, postponed payments. The notes in question have two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear seven (7) per cent interest until fully paid, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity. The said notes do not contain in order to be negotiable "an unconditional promise * * * to pay a sum certain".

7. An examination of the notes set forth in the plaintiff's statement of claim reveals that they contain the following provision: "And in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection."

Wherefore, the said defendant prays that judgment be entered in his favor, and that the said plaintiff may be barred from having or maintaining his said action against him. If the Court, however, should decide the questions of law herein raised against the defendant, then he prays leave to file a supplemental affidavit of defense to the aver-

ments of fact set forth in the plaintiff's statement of claim, within fifteen (15) days.

(Sgd.) Erwin M. Fried. Wm. H. Schneller, Attorney for Erwin M. Fried.

Duly sworn to by Erwin M. Fried. Jurat omitted in printing.

[fol. 15] In United States District Court

Opinion Sur Statutory Demurrer—Filed May 16, 1932

Dickinson, J.:

The defendant has interposed to the claim of the plaintiff an affidavit of defense raising questions of law. Among them is one raising the question of the right of the plaintiff to sue in its own name. The plaintiff acquired no title to the notes in suit until after maturity and dishonor. It is in consequence not an endorsee but an assignee. It is, however, a holder. Pennsylvania has always observed the distinction between one in whom is the right of action and one who has the right to the fruits of a recovery in the action brought. It has further always adhered to the rule that the action must be brought in the name of the former as legal plaintiff, permitting it however to be brought to the use of the beneficial owner. To this rule there are however exceptions. One is statutory. There is, for instance, [fol. 16] a Pennsylvania Statute which gives to the assignee of a bond the right to sue in his own name qua assignee. This is often used as an illustration of the rule referred to and affords a good one. The Statute prescribes how such assignments shall be made. The law recognizes the title of an assignee, the assignment to whom is irregular in that it does not conform to the requirements of the Statute but distinguishes it from the title conferred by an assignment which does so conform. The former is termed an equitable; the latter a legal assignment. The latter may sue in his own name qua assignee but the former must sue in the name of the obligee to use &c.

The law merchant supplies us with another exception to the cited rule. One to whom negotiable paper has been passed in due course by endorsement before maturity sue-

ceeds to all the rights of the payee as fully as if the promise had been made to such endorsee and in consequence may sue in his own name. After dishonor the law merchant is no longer applicable, and those who take dishonored paper take what they get, not under the law merchant but under the law of contracts.

It would be interesting to trace the effects of this upon the right of the holder to sue and the distinctions drawn between actions by endorsee against endorser and by holder against maker.

The conclusion we have reached however makes any such inquiry unprofitable. The question is a purely procedural one, and it is of no very great real importance whether the owner of a cause of action asserts a right of action thereon in his own name as legal plaintiff or in the name of the [fol. 17] original owner to the use of the succeeding owner. The common law in its adherence to logically developed processes requires a legal right to be enforced in the name of the legal plaintiff. Equity in its adoption of more plastic processes ignores parties plaintiff and defendant and knows only parties treating as such those who have the real beneficial ownership of the cause of action indifferent to those who no longer have concern with it. In some jurisdictions one system is followed; in others the other. The really important thing is to be able to know which rule to follow.

It has been urged upon us that the Pennsylvania rule has been settled for us by the Negotiable Instruments Act. The Act distinguishes, it is said, between "holders" and "holders in due course", giving to either the right to sue in his own name as legal plaintiff. However this may be, the Courts of Pennsylvania have ruled that the "holder" of negotiable paper, whether he acquired title before or after dishonor, may sue in his own name as legal plaintiff or in the name of a former holder to his use.

In Henratty vs. Dougherty, 71 Pa. (Sup.), 248, the suit was brought in the name of the payee to the use of a holder after dishonor. A point was submitted and refused that the suit should have been by the holder. The judgment was affirmed. The opinion, however, arguendo laid down the doctrine that such a holder might sue in his own name but was not bound to do so.

We accept this opinion although obiter as an authoritative statement of the law of Pennsylvania as applied to

holders of negotiable paper. Following it we hold that a "holder" after dishonor may sue either in his own name [fol. 18] as legal plaintiff or to his use. The present action is in this respect properly brought.

This takes us to the second question raised. It is that of the negotiable character of the note in suit. The denial is based upon the uncertainty of the sum of money promised to be paid. The note is a promise to pay a named sum, with interest, until fully paid. This is an unconditional promise to pay a sum certain. There is a further promise however to pay the interest semi-annually. One of the notes matures in six months and the other in a year. A third promise is "deferred interest payments to bear interest from maturity" at a rate greater than that which the principal debt carries. One to whom the note was offered in due course (if taken after an interest period had passed) could not from the face of the paper tell how much was payable at the maturity of the note, nor if payment was deferred how much he would ultimately recover. It has been held in Pennsylvania that this feature destroys the negotiability of the note.

Bank vs. Bosler, 297 Pa. 353.

The plaintiff seeks to differentiate Bank vs. Bosler from the instant case because of the fact circumstance that there the "debt" bore different interest rates, and here the principal debt bore one rate and the deferred interest payment another rate, and failing this questions the authority of the cited case on the strength of

Bank of Sutton, 52 Fed. Rep. 192, and
Jocknus vs. Claussen, 47 (2nd) Fed. Rep. 766.

There is also reference made to the case of New vs. Edley, which we assume to be as yet unreported, but the [fol. 19] quoted excerpts from which we accept as accurate.

We cannot withhold the comment that the criticisms of Bank vs. Bosler are based upon a misconception of what that case rules. It is of the very genius of the law merchant that negotiable paper may be taken at its face value, so that it may form part of and a very important part of the circulating medium of exchange. It is because of this that negotiable paper is termed an "instrument". It is emphatically an instrument of commerce. There should

in consequence be no more doubt of what is to be received at the maturity of a note than there is about a National Bank note. Take a note which calls for a payment of interest before the maturity of the note. Assume it to be negotiated in due course after the interest payment period but before the maturity of the note. What must the maker pay the holder? Is the interest taken to have been paid or not? If the maker has paid the interest to the payee must he pay the holder notwithstanding? If interest is not paid according to the tenor of the note has the note been dishonored and the holder take it subject to all the equities? Is such a note negotiable before the interest due date but not thereafter? If the note is not paid at maturity, what sum is to be paid?. It is idle to say there is any certainty in such an obligation, having in mind that the test of certainty is not what a court may ultimately decide to be payable but what the note on its face discloses.

The conclusion reached is that the obligation in suit is not negotiable. It follows from this that under the procedural law of Pennsylvania there is in the plaintiff no right of action. We accordingly rule that the questions [fol. 20] discussed are answered favorably to the defendant.

1. The obligations sued upon are not negotiable instruments under the law merchant or the Negotiable Instruments Act.

2. The statement of claim discloses no legal right of action in the plaintiff.

An appropriate order may be submitted. For such guidance as it may be to the plaintiff we add leave to amend.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR RE-ARGUMENT—Filed Oct. 10, 1932

DICKINSON, J.:

There are in this case two questions. One is a question of substantive law and the other procedural. At least in form the question before us is wholly and purely proced-

ural. The case being a Pennsylvania case the procedural law of Pennsylvania controls. The case as before ruled was upon the following propositions:

1. If the case is one of the law merchant, as it is if the instrument sued upon is what is called negotiable, the suit may be brought either in the name of the holder of the negotiable instrument or in the name of the payee to his use.

2. If, however, the case is controlled by the ordinary law of contracts, or in other words, if the instrument in suit is not negotiable, then the action must be brought in the name of the one with whom the contract is made as legal plaintiff to the use of any assignee of the contract.

[fol. 21] 3. The question of whether the case comes under the law merchant or the law contract is determined by the other question of whether the instrument sued upon is negotiable.

4. This latter is a question of substantive law but its determination determines likewise the procedural question.

It is thus clear that what may be called the formal question is a procedural one. The real question is one of substantive law in the sense that what is the substantive law determines the procedure. There is much force in the argument presented to us that the question of substantive law is to be determined by the law of the place of the contract. Even if this be true the procedural question is to be determined by the law of the forum. There is back of it all the practical situation that it is of no real importance whether the suit be brought in the name of B. as legal plaintiff or whether it is brought in the name of A. as legal plaintiff to the use of B. So far as practical results are involved, the procedural question might well be ignored and the question of substantive law determined as a trial question. The difficulty in accepting this practical view is that the Courts of Pennsylvania have always enforced the procedural view and required that action should be brought in the name of the legal plaintiff and by no one else. It is true that this controls a determination of what is the substantive law in determining what is the procedural law. We see, however, no escape from this situation. It is the very situation which was presented in the Bosler

case, 297 Pa. 353. There a suit was brought upon an instrument and was properly brought if the instrument was [fol. 22] negotiable, otherwise the wrong party had been made the legal plaintiff. The Court in that case determined that the instrument was not negotiable and hence the suit had been improperly brought. The case was therefore determined as one of procedure but it was determined in accordance with what was found to be the substantive law in that the instrument was held not to be negotiable and hence the suit improperly brought.

We feel bound to follow the doctrine of this case as one upon all fours with the instant case in its procedural features. It is not on all fours with the instant case upon the question of whether or not the instrument here sued upon is negotiable. The basic principle upon this question is one of policy. In order that those dealing with negotiable instruments may deal with them with confidence, such instruments must be taken at their face value, and there must be certainty in respect to what this face value is. Where there is a promise to pay a sum certain at a given date, any one is protected in accepting the instrument before maturity at its face value, even if in fact it has been paid in whole or in part before maturity, if the endorsee is innocently ignorant of the payment. It is difficult to follow the thought of certainty in the promise of this instrument because there are really two promises. One is to pay the interest on the obligation at the end of six months from date. The other is to pay the principal at the end of three years. The first promise matured at the end of the six months' period and if not kept the instrument was dishonored. The other obligation is not dishonored by non-payment until a later date and an endorsee of both promises takes the one after dishonor and the other before it. This [fol. 23] means that he is an innocent holder for value of one obligation before maturity but is not such innocent holder of the other obligation. How can there under this situation be said to be any certainty?

We adhere to the view before expressed that this Court should follow the doctrine of the Bosler case, and the motion for a re-argument is denied.

An appropriate order may be entered in accordance with the opinion before handed down.

IN UNITED STATES DISTRICT COURT

DECREE ENTERING NON PROS.—Filed Oct. 28, 1932

And now, to wit, this twenty-eighth day of October, 1932, upon consideration of the pleadings, and after argument, and pursuant to opinion Sur Statutory Demurrer filed May 16, 1932, and opinion Sur Motion for Reargument filed October 10, 1932, the plaintiff having declined to avail itself of the leave granted to amend, it is

Ordered, Adjudged and Decreed that the question of law raised in the affidavit of defense filed, to wit, that the assignee of the obligation sued upon cannot maintain an action in its own name and right is decided in favor of the defendant; and it is further ordered that the said action as brought has abated, and a judgment of non pros. in favor of the defendant and against the plaintiff is entered, with costs to the defendant.

By the Court.

Dickinson, J.

[fol. 24] IN UNITED STATES DISTRICT COURT

EXCEPTION OF PLAINTIFF TO DECREE OF NON PROS.—Filed Nov. 14, 1932

And Now, to wit, this 14th day of November, 1932, on motion of Blanc and Steinberg, Esqs., attorneys for the plaintiff, an exception is allowed to the Decree of this Court, dated the 28th day of October, 1932, entering a judgment of non pros. against the plaintiff.

Dickinson, D. J.

IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF FOR APPEAL—Filed Nov. 15, 1932

To the Honorable Oliver B. Dickinson, District Judge:

The above-named Burns Mortgage Company, Inc., feeling aggrieved by the decree and judgment of non pros. rendered and entered in the above-entitled case on the 28th

day of October, 1932, does hereby appeal from said decree to the Circuit Court of Appeals for the Third Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under rules of such Court in such cases made and provided;

[fol. 25] And your petitioner further prays that the proper order relating to the required security to be required of it be made;

And your petitioner will ever pray, etc.

Burns Mortgage Company, Inc., by P. V. Burns, President.

Duly sworn to by P. V. Burns. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Nov. 15, 1932

And now, to wit, this 14th day of November, 1932, the prayer of the foregoing petition for appeal is allowed. Security shall be entered in the sum of Two Hundred Dollars ($200.00).

By the Court.

Dickinson, D. J.

[fol. 26] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Nov. 15, 1932

Plaintiff, Burns Mortgage Company, Inc., by its attorneys, Blanc and Steinberg, Esqs., assigns the following errors in support of its Petition for Appeal from the District Court of the United States for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit:

1. The learned Judge of the District Court erred in entering the following Decree on October 28, 1932, entering a judgment of non pros. against the plaintiff:

"Decree

And now, to wit, this twenty-eighth day of October, 1932, upon consideration of the pleadings, and after argument, and pursuant to opinion Sur Statutory Demurrer filed May 16, 1932, and opinion Sur Motion for Reargument filed October 10, 1932, the plaintiff having declined to avail itself of the leave granted to amend, it is

Ordered, Adjudged and Decreed that the question of law raised in the affidavit of defence filed, to wit, that the assignee of the obligation sued upon cannot maintain an action in its own name and right is decided in favor of the defendant; and it is further ordered that the said action as brought has abated, and a judgment of non pros. in favor of the defendant and against the plaintiff is entered, with costs to the defendant.

By the Court.

Dickinson, J."

[fol. 27] The Exception taken to the foregoing Decree is as follows:

"Exception of Plaintiff to Decree of Non Pros.

And now, to-wit, this 14th day of November, 1932, on motion of Blanc and Steinberg, Esqs., attorneys for the plaintiff, an exception is allowed to the Decree of this Court, dated the 28th day of October, 1932, entering a judgment of non pros. against the plaintiff.

Dickinson, D. J."

2. The learned Judge of the District Court erred in making the following findings of law in the Opinion filed in the above-entitled case on May 16, 1932:

(a) "The plaintiff acquired no title to the notes in suit until after maturity and dishonor. It is in consequence not an endorsee but an assignee. It is, however, a holder."

(b) "After dishonor the law merchant is no longer applicable, and those who take dishonored paper take what they get, not under the law merchant but under the law of contracts."

(c) "One to whom the note was offered in due course (if taken after an interest period had passed) could not from

the face of the paper tell how much was payable at the maturity of the note, nor if payment was deferred how much he would ultimately recover. It has been held in Pennsylvania that this feature destroys the negotiability of the note. Bank vs. Bosler, 297 Pa. 353."

[fol. 28] (d) "There should in consequence be no more doubt of what is to be received at the maturity of a note than there is about a National Bank Note. Take a note which calls for a payment of interest before the maturity of the note. * * * It is idle to say there is any certainty in such an obligation, having in mind that the test of certainty is not what a Court may ultimately decide to be payable but what the note on its face discloses."

(e) "The conclusion reached is that the obligation in suit is not negotiable. It follows from this that under the procedural law of Pennsylvania there is in the plaintiff no right of action. We accordingly rule that the questions discussed are answered favorably to the defendant."

(f) "1. The obligations sued upon are not negotiable instruments under the law merchant or the Negotiable Instruments Act."

(g) "2. The statement of claim discloses no legal right of action in the plaintiff."

3. The learned Judge of the District Court erred in making the following findings of law in the Opinion filed in the above-entitled case on October 10, 1932:

(h) "2. If, however, the case is controlled by the ordinary law of contracts, or in other words, if the instrument in suit is not negotiable, then the action must be brought in the name of the one with whom the contract is made as legal plaintiff to the use of any assignee of the contract."

(i) "It is thus clear that what may be called the formal question is a procedural one. The real question is one of [fol. 29] substantive law in the sense that what is the substantive law determines the procedure. There is much force in the argument presented to us that the question of substantive law is to be determined by the law of the place of the contract. Even if this be true the procedural question is to be determined by the law of the forum. There is back of it all the practical situation that it is of no real

importance whether the suit be brought in the name of B. as legal plaintiff or whether it is brought in the name of A. as legal plaintiff to the use of B. So far as practical results are involved, the procedural question might well be ignored and the question of substantive law determined as a trial question. The difficulty in accepting this practical view is that the Courts of Pennsylvania have always enforced the procedural view and required that action should be brought in the name of the legal plaintiff and by no one else. It is true that this controls a determination of what is the substantive law in determining what is the procedural law. We see, however, no escape from this situation. It is the very situation which was presented in the Bosler case, 297 Pa. 353."

(j) "It is difficult to follow the thought of certainty in the promise of this instrument because there are really two promises. One is to pay the interest on the obligation at the end of six months from date. The other is to pay the principal at the end of three years. The first promise matured at the end of the six months' period and if not kept [fol. 30] the instrument was dishonored. The other obligation is not dishonored by non-payment until a later date and an endorsee of both promises takes the one after dishonor and the other before it. This means that he is an innocent holder for value of one obligation before maturity but is not such innocent holder of the other obligation. How can there under this situation be said to be any certainty?"

(k) "We adhere to the view before expressed that this Court should follow the doctrine of the Bosler case, and the motion for a re-argument is denied."

Blanc and Steinberg, by Sigmund H. Steinberg, Attorneys for Burns Mortgage Company, Inc.

In United States District Court

Præcipe for Record—Filed Nov. 15, 1932

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals pursuant to an appeal filed in the above-entitled proceedings, and to include in such transcript the following:

(1) Docket Entries;
(2) Plaintiff's Statement of Claim;
(3) Affidavit of Defense raising Questions of Law;
(4) Opinion by Dickinson, J., sur Statutory Demurrer, filed May 16, 1932;
[fols. 31 & 32] (5) Opinion by Dickinson, J., sur Motion for Reargument, filed October 10, 1932;
(6) Decree entering a non pros., filed October 28, 1932;
(7) Order of Court allowing Exception to said Decree, filed on November 14, 1932;
(8) Petition of Plaintiff for appeal;
(9) Order allowing appeal;
(10) Assignments of Error;
(11) Præcipe for Record on appeal.

Blanc and Steinberg, by Sigmund H. Steinberg, Attorneys for Burns Mortgage Company, Inc., Plaintiff-Appellant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] Minute entry of argument and submission, April 14, 1933, omitted in printing.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5086

BURNS MORTGAGE COMPANY, INC., Plaintiff-Appellant,

v.

ERWIN M. FRIED, Defendant-Appellee

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed September 19, 1933

Before Buffington, Davis, and Thompson, Circuit Judges

THOMPSON, Circuit Judge:

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The Burns

Mortgage Company, Inc., as holder, brought an action in assumpsit upon six promissory notes against Erwin M. Fried, the maker. The notes were executed and delivered in Florida. Each contained the following provisions:

"With interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Inter- [fol. 35] est payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The statement of claim averred that the payee, the Golden Isles Corporation, endorsed and delivered the notes before maturity to one Williamson. Payment was refused at maturity. Thereafter Williamson endorsed and delivered the notes to the Burns Mortgage Company, Inc. In an affidavit of defense raising questions of law, the defendant averred that the notes were not negotiable instruments and that the suit was therefore improperly brought in the name of the Burns Mortgage Company, Inc., as plaintiff, but should have been brought in the name of the payee, the Golden Isles Corporation, to the use of the assignee, the Burns Mortgage Company, Inc. The District Court gave the plaintiff an opportunity to amend but, after this privilege was refused, a judgment of non pros. was entered.

The ultimate question for decision on appeal is a procedural one: whether the Burns Mortgage Company, Inc., was entitled to bring suit in its own name as plaintiff.

The primary question is whether the notes are negotiable since, if they are, suit may be instituted by the holder in its own name. The appellant contends that the negotiability of the notes must be determined by the law of Florida, the state where the notes were executed, and that the Supreme Court of Florida, construing the Florida Negotiable Instruments Law, has held that notes such as those in suit are negotiable: Taylor v. American Bank, 63 Fla. 631, 57 So. 678 (1912). The appellee maintains that Pennsylvania and not Florida law applies and that, measured by the standards contained in the Pennsylvania decisions, the [fol. 36] notes in suit are not negotiable. First National Bank of Miami v. Bosler, 297 Pa. 353.

It does not follow, from the fact that the notes were executed in Florida or that suit was brought in a District

Court held in Pennsylvania, that decisions of the courts of these states bind us upon the question of negotiability. The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts. Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jockmus v. Claussen, 47 F. (2d) 766.

Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. v. Raleigh, 62 F. (2d) 705, contra.

We find no precedent in the Third Circuit upon this question. In Forrest v. Safety Banking Co., 174 Fed. 345, decided after the adoption of the Pennsylvania Negotiable Instruments Law, Judge McPherson declined to determine how far the federal courts were bound by the construction given by a state court of last resort to a statute such as the Negotiable Instruments Law which attempts to codify the rules that govern a branch of general commercial law. If the state legislature had modified or changed the common law or the law merchant in its Negotiable Instruments Law, we would consider ourselves bound by the construction of the state court. We think, however, that under the rule laid down by Mr. Justice Story in Swift v. Tyson, 16 Pet. 1, the true interpretation and effect of instruments of a commercial nature are to be sought not in the decisions of the local tribunals but in the general principles and doctrines of commercial jurisprudence. We must, therefore, determine the question [fol. 37] of the negotiability of the notes in suit in accordance with what we find to be the general commercial law.

The Uniform Negotiable Instruments Law was in force in both Florida and Pennsylvania at the time of the execution of the notes. Sections 1 and 2 provide as follows:

"1. That an instrument to be negotiable must conform to the following requirements: * * *

"(2) Must contain an unconditional promise or order to pay a sum certain, in money; * * *

"2. The sum payable is a sum certain, within the meaning of this Act, although it is to be paid:

"(1) With interest; or,

"(2) By stated installments; or,

"(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *."

Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due. The notes in their terms entirely negative the assertion of certainty. How can the sum due be said to be certain when there is nothing upon the face of the notes to indicate the amount of the semi-annual interest payments due to the holder? Or how can it be certain from the face of the notes whether interest payments have been deferred and, if so, to what amount deferred interest payments bear interest at 10% semi-annually?

The suit is not brought in the name of the payee but in the name of one who claims to be a holder for value. The maker, if sued by the payee, would be entitled to set up any defenses available between himself and the payee but, [fol. 38] if the instrument is negotiable, he is liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument. The extent of his liability must therefore appear upon the face of the note; otherwise there is no certainty as to the sum due.

The appellant, to sustain its contention that the notes in suit are negotiable, has cited cases where the instruments sued upon were bonds to which interest coupons were attached. Those cases are not in point since it is obvious that the holder of a coupon bond can see at a glance exactly what amount is due at any given period.

We are in accord with the reasoning and conclusions of the Supreme Court of Pennsylvania in First National Bank of Miami v. Bosler, supra, and of the Supreme Court of New Jersey in Miami Shores Corporation v. Duggan, 155 Atl. 262, affirmed 160 Atl. 619. We conclude that the notes in suit are not negotiable since they lack certainty in amount, one of the essential elements of negotiability.

In view of our discussion concerning the negotiability of the notes in suit, we do not deem it necessary to do more than indicate that the Conformity Statute (28 U. S.

C. A. 724) requires that in all procedural matters we apply the law of the state within which the District Court is held.

Our conclusion is that the learned trial judge did not err in his disposition of the questions of law raised in the affidavit of defense.

The judgment of the court below is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5086

BURNS MORTGAGE CO., INC., Appellant,

vs.

ERWIN M. FRIED, Appellee

JUDGMENT—Filed Sept. 19, 1933

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is, hereby affirmed with costs.

Philadelphia, September 19, 1934.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fols. 40–55] Petition for rehearing covering 15 pages, filed Oct. 17, 1933, omitted from this print. It was denied, and nothing more by order of Nov. 15, 1933.

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ORDER DENYING PETITION FOR REHEARING—Filed Nov. 15, 1933

And now, to wit, November 15, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,389. U. S. Circuit Court of Appeals, Third Circuit. Term No. 786. Burns Mortgage Company, Inc., Petitioner, vs. Erwin M. Fried. Petition for a writ of certiorari and exhibit thereto. Filed February 13, 1934. File No. 786, O. T., 1933.